United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7403

ORIGINAL

76-7440

To be argued by
WILLIAM B. LAWLESS

In The

United States Court of Appeals

For The Second Circuit

CONTEMPORARY MISSION, INC.,

Plaintiff-Appellee,

-against-

FAMOUS MUSIC CORPORATION,

Defendant-Appellant,

PARAMOUNT PICTURES CORPORATION and GULF + WESTERN CORPORATION,

Defendants.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

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BRIEF FOR DEFENDANT-APPELLANT FAMOUS MUSIC CORPORATION

STATEMENT OF ISSUES PRESENTED

This is an appeal by Famous Music Corporation ("Famous") from a verdict rendered against it and in favor of Contemporary Mission, Inc. ("Contemporary") in the United States District Court, Southern District of New York, before the Hon. Richard Owen on Friday, May 28, 1976.

The first issue is:

Whether the jury's determination that Famous breached what is called the Virgin contract and caused plaintiff damage in the amount of $63,473 is against the weight of credible evidence?

The second issue presented is:

Whether that portion of the verdict that awarded damages for breach of what is called the Crunch contract be set aside as a matter of law and judgment entered in favor of defendant-appellant dismissing those claims?

For this Court to decide the second issue in favor of appellant Famous, it must sustain only one of the following propositions:

(i) there is no admissible proof that ABC Records, Inc. ("ABC") breached the Crunch contract;

(ii) Contemporary could not bring suit for breach of the Crunch contract because it failed to give the notice of breach required by the contract; and

(iii) Contemporary is estopped from claiming a breach of the Crunch agreement by ABC.

STATEMENT OF CASE

A. Nature of Case

This is an appeal by Famous from a jury verdict of May 28, 1976 and judgment entered pursuant thereto, dated June 30, 1976, of the United States District Court for the Southern District of New York. Said judgment granted Contemporary some $211,000 in damages on the various claims asserted against Famous. Famous is the only defendant who is prosecuting an appeal.

Contemporary commenced the instant action in November of 1974 against Famous, Paramount Pictures Corporation ("Paramount") and Gulf + Western Corporation ("G+W), all of whom filed answers and commenced discovery shortly thereafter.

In December of 1975, after the filing of the pretrial order, but before completion of discovery, the plaintiff moved for a trial preference. The defendants opposed the motion and cross-moved for security for costs. Both motions were denied by Judge Richard Owen without opinion (R26, 35).[1] The case was then placed on the trial calendar for a date in April of 1976. In the interim, the defendants made a motion for partial summary judgment, which was denied because the court found triable issues of fact (R56).

On May 10, 1976, the selection of a jury commenced before Judge Owen and that jury, on May 28, 1976, reached the verdict set forth below.

B. Verdict and Opinions Below

The court submitted the case to the jury in two parts, the first portion as to liability and the second concerning damages. The court's questions and the jury's answers as to liability and damages are set forth below:

Liability Questions

1. Has plaintiff established by a fair preponderance of the credible evidence that Famous breached the Virgin agreement by failing to adequately promote Virgin in its various aspects as it had agreed? Yes

2. If you find a failure to adequately promote, did that cause plaintiff any damage? Yes

1. The letter R followed by a number will indicate the document referred to from the Record on Appeal.

3. Did the assignment of the Virgin contract by Famous to ABC cause any damage to plaintiff? Yes

4. Did plaintiff establish by a fair preponderance of the credible evidence that Famous failed to use "its reasonable efforts consistent with the exercise of sound business judgment" to promote the records marketed under the Crunch label? No

5. Did plaintiff establish by a fair preponderance of the credible evidence that there was a refusal by ABC to perform the Crunch contract and promote plaintiff's music after the assignment? Yes

6. If your answer is "yes" to either 4 or 5 above, did such a breach or breaches of the Crunch agreement cause plaintiff any damage? Yes

7. Did Tony Martell, on behalf of Famous, in talking to any member of plaintiff, make an agreement to reimburse plaintiff for the expense of its members promoting their music around the country? Yes

Damage Questions

1. To what damages is plaintiff entitled under the Virgin agreement? $ 68,773

2. To what damages is plaintiff entitled under the Crunch agreement? $104,751[2]

3. To what unallocated damages as between the Virgin and Crunch and oral agreements is plaintiff entitled — if any? $ 21,000

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2. The jury incorrectly added certain damages; the figure read by the jury in court was $94,751.

4. To what damages, if any, is plaintiff entitled under the oral agreement? $ 16,500

Judge Owen, having previously denied without opinion the motion for partial summary judgment made by all of the defendants, issued the following substantive rulings during the course of the trial:

1. At the close of plaintiff's case:

All the causes of action pleaded against Paramount were dismissed because there was no proof in the record even tending to prove any claim made against Paramount (A120; T1829).[3]

The court dismissed the second and fifth causes of action against Famous insofar as they sought to recover for lost profits or royalties caused by breach of the Virgin agreement or the Crunch agreement. The court stated that in order for the jury to award damages, it would need to engage in "the highest form of speculation" since there was no proof in the record from which to determine damages (A120-121; T1829-1830).

The court next dismissed the sixth cause of action against G+W, which sought to recover for inducing breach of contract, specifically ruling that *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 301 N.Y.S.2d 610 (S.D.N.Y. 1969) mandated such a dismissal (A120; T1829).

2. During the defendants' case:

The court dismissed the seventh and last remaining claim against G+W for conversion, finding that there was no proof that plaintiff had title to the various records. The court relied upon *Lambros Seaplane Base v. The Batory*, 117 F.Supp. 16

3. The letter A followed by a number indicates the page reference from the Appendix; the letter T refers to the transcript. In all cases where there is reference to the trial transcript, a double reference will be given to both the Appendix and the trial transcript.

(S.D.N.Y. 1953); *Prosser on Torts,* 4th Edition, p. 83 and the lack of proof in the record that G+W ever intended to possess the records in question (A143-145; T2006-2008).

3. At the close of all the proof:

The court dismissed the seventh cause of action, which pleaded conversion against Famous, because plaintiff had failed to prove any title to the records, there was no proof of damages suffered as the result of a conversion, and defendant Famous had offered before and during the trial to effectuate the return of whatever records ABC possessed bearing the Crunch label or produced under the Virgin contract (A175-178; T2297-2300).

A directed verdict was granted on Famous' counterclaim for one-half of the foreign advances received by Contemporary for products released under the Crunch label.[4] This amounted to $3,750 (A179; T2374). The judge denied without opinion all other portions of Famous' motion for a direct verdict.

After the entry of judgment pursuant to the jury verdict, Famous moved for a judgment notwithstanding the verdict; that motion was denied without opinion (R63).

C. Statement of Facts

1. The Parties

Contemporary is a corporation existing under the laws of the State of Missouri and is a legal vehicle employed by its six members to market musical recordings and related products.[5] At

4. During the course of the trial, the court had permitted the defendant Famous to amend its complaint to plead a counterclaim. The court likewise had granted plaintiff's motion to amend its complaint to include an eighth cause of action claiming breach of an oral contract. There is no dispute as to these amendments.

5. References to the Record, the Appendix or the trial transcript will be made in the Argument, since the facts set forth herein are background material.

all relevant times Famous was and is a wholly-owned subsidiary of G+W. Paramount also is a wholly-owned subsidiary of G+W and with Famous is contained in the leisure-time division of the G+W conglamerate. Famous was involved in producing musical recordings for distribution and sale throughout the United States with its headquarters located in the G+W building at Columbus Circle in New York City.

Tony Martell, with whom plaintiff's vice president, John T. O'Reilly, dealt exclusively and as will be set forth below, was hired to be President of Famous by the chief operating-officer at G+W, David Judelson, in 1971. Martell was selected primarily because he had supervised the distribution of two recordings in the industry, one known as TOMMY and the other known as JESUS CHRIST SUPERSTAR, which were monumental successes. Judelson had believed that Martell's leadership would convert Famous into a prospering source of revenue for G+W.

2. The Virgin Agreement

In the summer of 1972, John T. O'Reilly, not only the vice president, but also chief musical coordinator for Contemporary, was anxious to market a religious rock opera known as VIRGIN. O'Reilly, a former Roman Catholic priest, had, in the "opera", described the conflict between continuing as a priest in the Church or leaving it to marry, something he would later do with one of Contemporary's lead singers.

After several larger companies turned down the rights to VIRGIN, a meeting was arranged with Martell, who listened to the tapes of the recording, was captured by it and predicted that it would become another JESUS CHRIST SUPERSTAR (the first and most successful religious rock opera). Martell immediately took the tape of VIRGIN "upstairs" to Judelson of G+W. Judelson, with his wife, played the tape and approved Martell's proposal that Famous acquire the rights to it.

A contract was then executed between plaintiff and Famous wherein Famous purchased the master tape of the musical work and purchased the libretto and publication rights as well. The agreement was signed on August 16, 1972 and was known as the Virgin agreement. It left for future execution the agreement of Famous to purchase the publication rights from plaintiff.

The Virgin agreement, while following the general terms of the industry, included two additional requirements in paragraph 14 that Famous (1) would appoint one person who would personally oversee the nationwide promotion of the two record VIRGIN album and (2) would expend, within six months after release, $50,000 on its promotion using all normal media including trade magazines, radio, TV, posters and the like. Aside from the specific requirements in paragraph 14, the contract also provided that Famous would release four separate singles in the next year from the album subject to Contemporary's approval. The term of the contract was twenty-eight (28) years but Contemporary had the right to terminate the contract on ten (10) days' written notice if Famous continued to breach any material term after notice of the breach or if, after five years, annual sales of the albums were less than 2,000. Further, there was a provision inserted providing that the contract could not be assigned unless (a) Famous voluntarily sold the entire business in which VIRGIN is used or (b) in connection with a merger between Famous and another business organization, the business was otherwise sold. Immediately after executing the Virgin contract with plaintiff, Martell personally took charge of the promotion of the album. Accepting the suggestion of O'Reilly, he rented Lincoln Center for an extraordinary world premiere of the album on October 18, 1972. Martell also alerted the company's national promotion and distribution staff to the prospects of VIRGIN, who echoed Martell's enthusiasm for the production after hearing the work.

Prior to the premiere Martell ordered special covers, which were quite expensive, for the album with complimentary copies to be distributed to all the guests at the premiere. At the same time Martell arranged with a major New York radio station for the entire album to be played without interruption during prime time the day before the premiere. Martell personally supervised the putting together of a guest list which included major radio station managers, disc jockeys, recording critics, as well as key clergymen who might be interested in the religious aspects of the recording. As a direct consequence, Philharmonic Hall was filled for the premiere which received a friendly response from the audience. Unfortunately the performance received unenthusiastic reviews by the major New York critics. A review by Don Heckman in *The New York Times* on October 20, 1972, for example, said in part:

> "Only a benign, but, unfortunately, shortsighted, faith could have brought a 'rock opera' called 'Virgin' into Philharmonic Hall for a showcase performance Wednesday night."
>
> * * *
>
> "Considering the costs of a one-shot presentation of this sort, 'Virgin' may have to be placed right up there with 'Dude' as one of the season's most disastrous show biz outings." (A287-288).

After the premiere, in accordance with the requests of Contemporary, Famous contributed $7,500 to the plaintiff to present a dramatic rendition of VIRGIN at a theatre in Greenwich Village, which they had rented for that purpose. O'Reilly insisted that the Village presentation would provoke additional publicity and would encourage sales of the VIRGIN album. Famous and/or G+W paid for tickets which were given away in order to promote the dramatic version, but their

efforts met even more negative reviews in the press, lack of public interest, and, finally, financial collapse.

Undaunted by the lukewarm press coverage of the Lincoln Center premiere and Village production, Tony Martell arranged a series of national promotion tours for O'Reilly. Martell arranged for important critics and radio station managers to be brought together to meet John O'Reilly in Chicago, Los Angeles, San Francisco, Milwaukee, Boston and other centers, in addition to personal appearances nationwide in scope. On these occasions Martell or his staff members would arrange cocktail parties with an introduction of John O'Reilly followed by dinners. Visits to radio station managers were also undertaken in those cities to which Martell was introducing the VIRGIN album.

In addition to his daily personal involvement, Martell employed the entire national promotion and distribution system maintained by Famous and pressed for as much air time as possible to promote the project. Again, the response was disheartening. Although an intensive promotion was made by Famous over a period of nineteen (19) months prior to the sale of the record division of Famous to ABC, the VIRGIN double-record album never gained any real national recognition. Comparatively few sales were made of the album in spite of the fact that various additional singles from the album and a one-record album HIGHLIGHTS OF VIRGIN were offered for sale throughout the United States. Of all the single recordings, only FEAR NO EVIL reached the modest position of number 61 on the Hot Souls Singles Chart in BILLBOARD magazine.

Plaintiff contended at the trial that FEAR NO EVIL could have reached a place of at least number 30 on the aforementioned chart, but there is no evidence in the record to support this prediction. Nor is there any proof as to what economic consequence such a rise would have brought to the total sales of the album itself.

Not only were the plaintiff's members encouraged to occupy the Famous offices where, at the expense of Famous, they made unlimited telephone calls to promote their product, but, in addition, the plaintiff volunteered to, and did in fact, take to the road in their own promotional efforts supervised by John O'Reilly, who in turn held daily meetings with Tony Martell in New York.

3. The Crunch Agreement

After Tony Martell purchased the VIRGIN album on August 16, 1972, convinced as he was of its potential success and wanting to preserve both the publication rights (sheet music) for Famous, together with possible motion picture rights for Paramount, he was determined that the Contemporary Mission group should be put under contract for future recordings for his company. He knew that Contemporary maintained recording studios in New York City and hoped that it was capable of producing master tapes. The plaintiff in turn was anxious to maintain its identity as a producer of recordings and sought permission to produce future recordings under its own label.

May of 1973, Famous and Contemporary therefore entered into a distribution contract, the Crunch agreement, under which Famous became the exclusive distributor of all plaintiff's musical compositions, other than those covered by the Virgin agreement. Famous was obligated to institute a new record label called "Crunch", and a number of records were to be released under it annually. Contemporary was obligated to deliver ten long-playing albums and fifteen original singles (which it did not do) within the first year of the contract, and under paragraph 8 of the Crunch agreement, Famous was to use "its reasonable efforts consistent with the exercise of sound business judgment" to promote and distribute the records.

By May of 1974, Contemporary had provided three of the required ten albums and four of the required fifteen singles. In an unfortunate pattern similar to all plaintiff's prior product, the

records released under the Crunch agreement were commercial and artistic failures.

At trial Contemporary claimed that Famous failed properly to promote and distribute the Crunch records. The jury, however, determined that Famous fulfilled its contractual obligations under the Crunch agreement, or to state it another way, Famous did not breach the Crunch agreement. The jury further determined that ABC had refused to perform the obligations it assumed when it purchased the assets and liabilities of the recording division of Famous from G+W on July 31, 1974. This sale by G+W was certainly a key factor in the institution of this lawsuit. Indeed, it was not until after the sale to ABC that the first written complaint from Contemporary was received by Famous, and shortly thereafter this action followed. As will be seen, the only finding of liability under the Crunch agreement was premised upon the alleged breach by ABC. ABC has never been a party to this action, nor has it ever been sued by Contemporary. It is the jury's verdict that ABC breached the Crunch agreement and that Famous breached the Virgin agreement that are the issues on this appeal.

INTRODUCTION TO ARGUMENT

First, Famous will show that the jury's verdict as to VIRGIN is against the weight of credible evidence.

Famous also challenges the verdict that ABC breached the Crunch contract, thus rendering Famous liable and makes three separate arguments as to that decision:

The record is barren of any proof that ABC breached the Crunch agreement because what proof the plaintiff did put forward as to ABC's alleged breach was not admissible.

Secondly, Famous asserts that Contemporary was barred from instituting any suit for breach of the Crunch agreement

because it failed to give the required contractual notice of breach before it instituted suit.

Lastly, the plaintiff, having repudiated the assignment of the Crunch contract to ABC, is now estopped from recovering for an alleged breach of that contract by ABC.

Famous, if successful as to either Virgin or Crunch, is also entitled to a reversal of the jury's award for $21,000 in unallocated damages. Both sides concede that a reversal as to Virgin or Crunch on this appeal will entitle Famous to a reversal of the award of unallocated damages.

I.

THE VERDICT AS TO FAMOUS' BREACH OF THE VIRGIN CONTRACT IS AGAINST THE WEIGHT OF THE CREDIBLE EVIDENCE.

In requesting the court to set aside the jury verdict on Liability Question No. 1, Famous is not unmindful of the heavy burden imposed by the jury's finding of liability. As Judge Timbers stated in *Simblest v. Maynard,* 427 F.2d 1 (2nd Cir. 1970):

> "This standard for the granting of a judgment N.O.V. has been expressed in various ways. Simply stated, it is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." *Id.* at 4.

See also *Brady v. Southern Railway Co.,* 320 U.S. 476, 479-480 (1943); *O'Connor v. Pennsylvania Railroad Co.,* 308 F.2d 911, 914-915 (2d Cir. 1962); *Mehra v. Bentz,* 391 F. Supp. 648

(E.D.N.Y. 1975). Famous submits that this is precisely the type of case where only one reasonable conclusion could have been reached.

The first question submitted to the jury required the determination of whether "Famous breached the agreement by failing to adequately promote VIRGIN in its various aspects as it had agreed." The obligations of Famous in this regard, as agreed to by both parties, are set forth in paragraph 14 of the Virgin agreement, which reads as follows:

> "Within the first year of this Agreement, FAMOUS shall select and appoint at least one person to personally oversee the nationwide promotion of the sale of the records hereunder. That person shall maintain personal contact with MISSION personnel and give weekly reports of the progress of such promotion. In addition, within the first year of this Agreement, FAMOUS shall spend no less than $50,000 on such promotion. The promotion media to be used are to include all media normally used for such promotions, such as trade magazines, radio and TV, posters, flyers, etc." (A188-200).

A careful review of the evidence adduced at trial reveals, unquestionably, that Famous completely fulfilled its promotional obligations under the Virgin contract.

A. First Year Promotional Expenditures

Defendant introduced telling proof at trial, through the testimony of Tony Martell, President of Famous, and Mel Schlissel, Vice-President of Finance of Famous, that it had spent at least $50,000 on the promotion of VIRGIN product by as early as the spring of 1973.

Martell, the man who took a personal as well as a professional interest in the success of VIRGIN, was unshakeable on this point. His testimony, under questioning by Mr. Lawless, is as follows:

> "Q. Is there any question in your mind as to whether or not $50,000 was spent on the promotion of Virgin by Famous? A. Absolutely not." (A141; T2001).

Mr. Martell gave the same testimony on redirect (A171; T2117), after plaintiff's counsel had tried and failed to get Martell to change this figure.

Mel Schlissel was the Vice-President in charge of Finance at Famous Music. As such, it was his task to ascertain the dollar amounts spent on promoting the records of Famous' artists (A159, 160; T2081, 2082). Specifically, Schlissel testified that he prepared a report for Martell early in 1973 which summarized the amount of money spent in the promotion of VIRGIN A161). This report confirmed the fact that Famous had fulfilled its promotional obligations in this regard; that by January or February 1973, a scant six months after the signing of the Virgin contract, the $50,000 had already been spent (A168; T2090).

Thus, the two men at Famous in the best position to know how much had been spent promoting records both testified that Famous had spent its required $50,000 in promoting VIRGIN.

This evidence is uncontradicted. Indeed, the only proof plaintiff offered in this regard was the testimony of its chief witness, John O'Reilly, that he didn't know how much Famous had spent in promoting VIRGIN (A91).

The only conclusion that reasonable men could reach here was that Famous had spent the $50,000, as agreed under the

Virgin contract. Even if, for some reason, it were concluded that Famous had not spent the $50,000, the uncontroverted evidence adduced at trial establishes that plaintiff had waived its rights in this regard. This was done by the November 28, 1973 letter from Famous to Contemporary Mission (A289), in which John O'Reilly agreed to waive the $50,000 promotional expenditure in return for a $7,500 advance from Famous needed by plaintiff to advertise its Village East performance (A84-90; T917-923).

B. The Personal Overseer of Promotion

Famous' other specific obligation under paragraph 14 of the Virgin contract was to appoint a person to supervise the nationwide promotion of VIRGIN and to maintain personal contact with the members of Contemporary, giving them weekly reports regarding the progress of such promotion.

We believe that the record shows, unequivocally, that plaintiff had the benefit of the President of the company as an overseer. Tony Martell (materially responsible for the success of JESUS CHRIST SUPERSTAR and TOMMY) testified that Herb Gordon, Famous' national promotional manager, was charged on a day-to-day basis with supervising the promotional work on VIRGIN (A142,149; T2002, 2030). But it was the efforts of Tony Martell himself in promoting VIRGIN that are the most striking aspect of Famous' promotional effort. He testified, perhaps greatly understating his role, that "I had a lot of input into it [the promotion of VIRGIN] because I believed in this music so much." (A142; T2002). Even a superficial recall of the promotional efforts — the gala premiere at Lincoln Center, the party at Sardi's, the trips to Chicago, Los Angeles, San Francisco and elsewhere — reveal the extraordinary effort Martell made on plaintiff's behalf. The record is replete with instances where O'Reilly or the other members of plaintiff were in daily contact with Martell. O'Reilly himself has testified as to the occurrence of these daily meetings (A5, 83; T109, 809). Plaintiff was given office space just two doors from Martell's

office and allowed use of a WATS line to promote its records (A138-140; T1949-1951). Thus, not only Gordon, but Martell himself, the man who "broke" both JESUS CHRIST SUPERSTAR and TOMMY, were the personal overseers of the VIRGIN project. Martell's constant personal contact with plaintiff cannot be denied. As for weekly reports, the testimony reveals that O'Reilly often had the reports and sales figures in his hands even before Martell did (A136; T1947).

The only "proof" that plaintiff could offer with regard to this issue is the bald assertion that a personal overseer was never formally appointed (A2-3; T106-107) and that Martell failed to formally notify Contemporary as to the identity of the personal overseer (A150; T2031).[6]

In light of the above, the only conclusion that reasonable men could draw is that Famous had fully performed its promotional obligations as specified in paragraph 14 of the Virgin contract. The first jury question was couched in terms of "adequate promotion", as expressly defined by the provisions of paragraph 14. The proof admits of but one interpretation — that Famous had fully performed its promotional obligations under the Virgin contract.

In this Circuit verdicts have been set aside where the jury implicitly found, *inter alia,* that plaintiff could not hear the siren or see the flashing lights of an approaching fire truck *(Simblest*

6. In fact, the only witness to testify for plaintiff as to any of the claimed breaches was John T. O'Reilly, the same O'Reilly who was found to be a willful copyright infringer by this Court, *Stigwood v. O'Reilly,* 530 F.2d 1096, 1103 (2nd Cir. 1976), for whom a vow of poverty meant an 18-room house in Westport, Connecticut, with guest cottage, pool and almost 300 feet of beach front property and a New York City apartment (A93-106; T986-999). This concept of poverty was not in accord with the testimony in *Stigwood, supra* (see A81, 82; T744, T757). Nor was his claim to clerical status obtained without controversy (A107-109; T1005, T1264) or consistent with his self-described calling as a "record producer" contained in his marriage license. *Stigwood* also revealed that a tax exemption for the plaintiff had been obtained through less than proper means (A108; T1016). Further, Mr. O'Reilly was held in contempt of Court by Judge Owen for his flagrant courtroom demeanor during this trial (R61; A110-119; T1604-1613).

v. Maynard, supra); that the ice on defendant's property had been there for more than a week *(O'Connor v. Pennsylvania Railroad Co., supra);* and that decedent, with four times the alcohol/blood ratio presumptive of intoxication, had endured conscious pain and suffering *(Mehra v. Bentz, supra).* No verdict is impregnable because, as Chief Judge Kaufman noted in the *O'Connor* case, "the inferences which may be drawn [by the jury] must be within the range of reasonable probability . . . and must not be at war with undisputed facts." (308 F.2d at 915).

The verdict here is at war with the undisputed facts; it should be set aside.

II.

THERE WAS NO ADMISSIBLE TESTIMONY INTRODUCED TO SHOW A BREACH OF THE CRUNCH CONTRACT BY ABC AFTER THE SALE BY G+W TO ABC.

A. Introduction

The defendant Famous contends that there is no admissible testimony in the record that demonstrates a breach of the Crunch contract by ABC after the July 31, 1974 purchase. In order to place this argument in the context of the lawsuit as it evolved at trial, it is first necessary to discuss the plaintiff's claims under the Crunch contract.

As to the Crunch agreement, the plaintiff pleaded and tried this case upon two separate theories — (1) Famous had failed to fulfill its contractual obligations under Crunch *and* (2) Famous had improperly attempted to assign the non-assignable Crunch agreement. NO OTHER THEORY OF LIABILITY AS TO THE CRUNCH CONTRACT WAS EVER ADVANCED BY PLAINTIFF. How, then, is Famous liable for some $104,751 under Crunch if the jury determined that Famous never breached Crunch (Liability Question No. 4) and the trial court determined that Crunch was assignable (A145; T2008)? This was

possible because Contemporary recovered a verdict against Famous under a theory that was never pleaded as an affirmative claim for relief at any time in this proceeding! Indeed, it was a theory that was continually disavowed by plaintiff's counsel as will be seen below. However, a brief discussion of this "non-theory" of recovery is appropriate.

Famous was held liable under a secondary or imputed theory of liability. It makes liability upon Famous, the assignor of the Crunch contract, contingent upon a showing that ABC, the assignee, had breached the obligations it had assumed under the Crunch agreement on July 31, 1974. Critical to plaintiff's recovering under this theory is a showing that ABC breached the Crunch agreement. As stated, not only did plaintiff never plead this claim,[7] but at the end of the trial plaintiff specifically disavowed any claim that ABC had breached the Crunch contract.[8] The last portion of the argument on the parties' various motions for a directed verdict made at the close of defendants' case reveals that at the very end of the trial the plaintiff was still insisting that Crunch was non-assignable as opposed to claiming that ABC had breached the Crunch contract it had assumed:

> "MR. TRIGGS: Particularly important also is the fact that there has never been a claim in this lawsuit that ABC breached and hence Famous is liable.
>
> MR. O'REILLY: We don't have to claim that ABC breached it. That would require first some contractual obligation and we are not saying that they did have a contractual obligation. We are saying now that Famous had a contractual obligation." (A180; T2395).

7. The theory that if the assignee breaches, the assignor remains liable was pleaded as a defense to defendants' motion for partial summary judgment (R58).

8. In the opening argument plaintiff's counsel stated that Crunch was non-assignable (A1; T29).

This persistently incorrect analysis of the law with attendant confusion was aggravated by the plaintiff's presentation of proof as to ABC's alleged breaches. The trial court's incorrect evidentiary ruling, while still reversible error, is hardly surprising in light of plaintiff's confusing presentation of the inadmissible testimony.

Before dealing with the specific testimony as to ABC, it is necessary briefly to discuss the assignability of the Crunch contract. Plaintiff's erroneous insistence throughout the trial that there was no claim of a breach by ABC is premised upon the notion that the Crunch agreement was *not* assignable. However, the law of New York requires an express and unequivocal prohibition of assignment before a contract is deemed non-assignable and because no such provision appears in the Crunch contract, it was clearly assignable and found by Judge Owen to be assignable. *State Bank v. Central Mercantile Bank*, 248 N.Y. 428, 435, 162 N.E. 475, 477 (1928); *Allhusen v. Caristo Construction Corp.*, 303 N.Y. 446, 103 N.E. 2d 891 (1952); *Empire Discount Corp. v. William E. Bouley Co.*, 5 Misc. 2d 228, 160 N.Y.S. 2d 395 (Sup. Ct. Monroe Co., 1957); *Madison Pictures v. Chesapeake Industries*, 147 N.Y.S. 2d 50 (Sup. Ct. Bronx Co. 1955). It was the firm but mistaken belief that Crunch was non-assignable which explains plaintiff's testimony as to its dealings with ABC.[9]

B. The Testimony as to ABC

On the second day of the trial, the plaintiff offered the first proof as to its dealings with ABC after the purchase of the Famous record division on July 31, 1974. The testimony initially concerns a conversation in or about August 1974 relating primarily to the Virgin contract, but later deals with Crunch.

Throughout the testimony, counsel William O'Reilly is the questioner and the witness is Contemporary's Vice-President,

9. Judge Owen ruled that Virgin was non-assignable and that Crunch was assignable (see A145; T2008). This ruling is both correct and unchallenged.

John O'Reilly. The first conversation with ABC was by telephone:

> "Q. With whom did you speak at ABC? A. I spoke to Mr. Len Korobkin.
>
> Q. Do you know what position Mr. Korobkin held in ABC? A. One of the attorneys at ABC. " (A7; T232).

In response to an objection that further testimony would be inadmissible hearsay, plaintiff's counsel argued:

> "MR. O'REILLY: The reason is, your Honor, because we have as part of our damages indicated we spent money in mitigation of damages.
>
> * * *
>
> *Now, we are claiming that these expenses associated with this would be in mitigation of that.* During this conversation an appointment had been made to go out to the coast about a week later or so. I have forgotten the time frame." (A8; T233) (emphasis supplied).

Again, the confusion about the plaintiff's claim when counsel for G+W and Paramount further argued:

> "MR. AMABILE: That is one of the questions we raise on our argument for summary judgment but there was no theory that was raised in the pleadings of this lawsuit that would permit recovery against the assignor because the assignee breached it. The only thing I gather is that the assignor did not breach the contract, but

that somebody else breached it and that the assignor is then derivatively liable. That is a new claim and that is one of our arguments —

THE COURT: I'm not sure I follow you.

MR. AMABILE: Under the claim as it is now being raised by the plaintiff, the assignee ABC breached the contract and therefore —

THE COURT: No.

MR. O'REILLY: *That is not the claim at all.*" (A11; T236) (emphasis supplied).

The testimony resumed with the witness indicating that he then went to Los Angeles to meet with someone at ABC. Once there:

"So I then called up Len Korobkin . . .

* * *

He [Korobkin] took the record up the stairs to the executive offices, came down about five or six minutes later and says 'Our company wants no part of this and we want no part of the whole arrangement with you people.'

Q. What was the whole arrangement, Father? A. No part of any contracts of ours.

THE COURT: This is what he said to you? What did he say to you?

THE WITNESS: He said, 'We want no part of this. We don't want to touch Crunch.' [sic] Those were his exact words." (A18; T243).

On the third day of trial, the plaintiff offered testimony only as to the alleged breaches of Crunch by ABC. Again the hearsay evidence concerns remarks by ABC's Korobkin.[10]

> "Q. While you were there, did you bring up the Crunch contract with anybody from ABC? A. Yes.
>
> Q. With whom did you bring it up? A. With the attorney representing ABC.
>
> Q. That is? A. Len Korobkin.
>
> Q. What was the substance of the conversation?
>
> MR. AMABILE. Objection to that.
>
> MR. O'REILLY: *This is introduced in mitigation of damages.*" (A39; T349) (emphasis supplied).
>
> * * *
>
> Q. Limit this to the Crunch portion of the conversation rather than to the Virgin portion. A. His words with regard to Crunch, 'I don't want to hear about Crunch. I don't even want to hear about Crunch.' This is what I got." (A41; T351).

Thus, not only did plaintiff insist throughout the trial that it did not claim a breach by ABC, but it proffered the testimony of conversations with Korobkin regarding Crunch in regard to the issue of mitigation of damages.

---

10. One of the attorneys at ABC.

Just as significantly, the record is barren of any other testimony by plaintiff that ABC somehow breached the Crunch contract. Again, this is not surprising since plaintiff really tried this case upon the theory that Crunch was not assignable and thus ABC had no duties or rights under the Crunch contract.

C. The Testimony as to Korobkin was Inadmissible

Besides the fact that plaintiff, by its admission, never offered any evidence to prove a breach of Crunch by ABC, the testimony from which it might be possible to show a breach is legally inadmissible. The trial court's error in this regard is not surprising since, as shown above, not only did plaintiff insist that no breach of Crunch by ABC was claimed but the testimony in question was introduced solely in mitigation of damages. This confusion was engendered solely by plaintiff's counsel.[11]

The testimony regarding Korobkin's conversations with O'Reilly is clearly hearsay (FRE §801) and hence must fall within some exception to the hearsay rule in order to be admissible. Before the potential exception is discussed, the testimony of O'Reilly in connection with Korobkin should be recalled. O'Reilly testified that Korobkin was an attorney on ABC's legal staff, who allegedly told O'Reilly that ABC did not want Crunch and did not want anything to do with plaintiff. Korobkin was also alleged to have said that he did not want the Famous purchase, but that the ABC management did (A19; T244). That ABC did purchase the recording division of Famous is the only indication in the record of Korobkin's ability to make or influence corporate decisions relating to the Famous acquisition. The importance of this inference is particularly relevant since it will be demonstrated herein that the plaintiff needs to show, as one of the two prerequisites to admissibility, that Korobkin had the authority to make such statements for ABC.

11. Plaintiff's counsel was nothing if not vigorous in his presentation of this and any other portion of the case. (See, for example, A175; T2297.) Indeed constant attempts at *ex parte* communications to the Judge were made by counsel O'Reilly (A186; T2410).

The new Federal Rules of Evidence ("FRE") reveal only one possible exception under which these statements could be introduced. It would need to be shown that Korobkin's statement was a declaration against interest.[12] FRE 804(b) provides in relevant part:

> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .
>
> (3) A statement which was at the time of making so far contrary to the declarant's pecuniary or proprietary interest. . . ."[13]

This specific provision has been dealt with prior to its enactment in *Gilmour v. Strescon,* 66 F.R.D. 146 (E.D. Penn. 1975). In that case, the court had to decide whether or not to exclude a written report by one of defendant's employees that another employee had during an installation damaged the malfunctioning crane that had caused the plaintiff injury. The court ruled that the report, in order to qualify as a declaration against interest, had to be against the proprietary and pecuniary interest of the individual making it. Obviously, Korobkin has no proprietary or pecuniary interest in the company because if ABC was sued and Contemporary received damages, Korobkin would not personally pay the damages. Where the declarant is an employee (as was Korobkin), there must be a real showing of authority to act on behalf of the company and hence make a declaration against the company's interest. Not only is the record barren of such proof, but it actually reveals that Korobkin, only a member of the in-house legal staff, did not think that ABC should have bought Famous at all (A19; T244). His authority with regard to matters relating to Famous would appear to be non-existent. The few cases decided under FRE 804

12. For this to be an admission ABC would have to be a party to this action, which it is not (see FRE 803).

13. The entire text of FRE 804 is set forth in an addendum to this brief.

also require a clear showing of authority by the employee to make a statement binding the company. There is no presumption that the company's interest will coincide with his own proprietary or pecuniary interest. See *Cedeck v. Hamiltonian Fed. Savings and Loan Assn.*, 414 F. Supp. 495 (E.D. Miss. 1976); *Workman v. Cleveland-Cliffs Iron Company*, 68 F.R.D. 562 (N.D. Ohio 1975). The framers of the rule probably wished to follow the prior case law. See 28 U.S.C.A. at Rule 804; Notes of Committee on the Judiciary House Report No. 93-650, p. 691; Notes of Advisory Committee on Proposed Rules, p. 697; *Richardson on Evidence*, §255 to §266 (1973). The plaintiff's failure to establish Korobkin's authority to make the statements in question on behalf of ABC is a sufficient ground in and of itself to rule the testimony inadmissible.

The plaintiff, assuming it could have shown that Korobkin had authority to make the statements in question, faces an additional requirement for admissibility under FRE 804 which it cannot satisfy.

FRE 804 requires as a second condition precedent to admissibility under FRE 804(b)3 that the declarant be "unavailable as a witness." This requirement of non-availability is set forth in relevant part in 804(a)5:

> "(a) Definition of unavailability: 'Unavailability as a witness includes' situations in which the declarant . . .
>
> * * *
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3) or (4), his attendance or testimony) by process or other reasonable means."

The concept of unavailability thus means the inability to obtain testimony at trial or by pre-trial deposition. In the case at bar, plaintiff has never attempted to serve Korobkin with a subpoena to testify at trial or a deposition, even though he has law offices in both Los Angeles and New York City.[14]

Nor is there any question that trial testimony and a deposition must be unobtainable. Rule 804(a) is explained by Judge Weinstein:

> ". . . Congress amended the rule to require an attempt to take the deposition if Rule 804(b)(5) was the foundation for exceptions 804(b)(2), (3) or (4)." (4 *Weinstein's Evidence*, 804-42).

The plaintiff then must fulfill a two-part test — the hearsay must be a declaration against interest, and the witness must be unavailable as defined in 804(a)5. Failure to satisfy either requirement bars introduction of the testimony.[15]

It should also be remembered that the requirement of unavailability, while defined by the new rules, is not a new one. Before its codification via FRE 804, this Court in *Vaccaro v. Alcoa Steamship Company*, 405 F.2d 1133 (2nd Cir. 1968) held:

> "A declaration against interest is only admissible where the defendant in unavailable . . ." *Id.* at 1137.

See also *Oscar Gruss & Son v. Lumberman's Mutual Casualty Co.*, 422 F.2d 1278, 1283 (2nd Cir. 1970).

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14. No ABC officer of employee was ever served with a subpoena to testify by the plaintiff.

15. Plaintiff's failure to even depose Korobkin is particularly surprising since the Federal Rules regarding depositions place no geographical limit on where a deposition may be taken. Korobkin, although not employed by ABC, as an officer of the court would presumably have been cooperative. See Rule 26, Federal Rules of Civil Procedure.

The court in *Gilmour, supra,* after determining that not only must it be shown that the declaration is against the declarant's interest, also ruled that the proponent must fulfill both requirements discussed above. The court's ruling sets forth the test of admissiblity which Famous claims was not met in the case at bar:

> ". . . Plaintiff contends that the report was a declaration by an agent against the interest of his employer. To fall within the 'declaration against interest' exception to the hearsay rule the declaration must state facts which are against the pecuniary or proprietary interest of the declarant and the declarant must be unavailable at the time of the trial. McCormick, *Evidence,* §276 at 670 (1972); Rule 804(b)(4) *Proposed Rules of Evidence. . .* It is clear that the declaration must be against the interest of the declarant's employer, the statement does not fall within this exception to the hearsay rule. Furthermore, the plaintiff failed to show that Mr. Luff was unavailable to the plaintiff as a witness . . ." *Id.* at 150.

Since the testimony about the conversations with Korobkin utterly fails to meet either of the two separate conditions precedent required for its admission, it should be stricken, and the verdict as to Liability Question No. 5 should be reversed, since there is then no proof in the record of any breach by ABC.

III.

CONTEMPORARY IS BARRED FROM PROSECUTING ANY CLAIM FOR BREACH OF THE CRUNCH CONTRACT BECAUSE IT FAILED TO GIVE THE REQUIRED CONTRACTUAL NOTICE.

A. Introduction

Famous contends that Contemporary failed to comply with the notice of breach provisions contained in the Crunch contract and is thus precluded from asserting any claim for breach of that contract against either Famous or ABC. Again it must be remembered that this portion of the argument addressed itself solely to the breaches claimed under the Crunch agreement and that the jury determined that Famous did not breach Crunch. There is nothing in the record to prove the giving of notice of the claimed non-performance by ABC for which plaintiff recovered at trial. (It bears repeating that this is probably the result of the position that Crunch was non-assignable, thus making it impossible for ABC to breach Crunch.) The notice provision of the contract, the applicable case law and the only notice of any breach given by Contemporary will now be discussed.

B. Notice of Breach Required by Paragraph 15 of the Crunch Agreement

The Crunch agreement states in paragraph 15 that:

> "No failure by Company [Famous] or owner [Mission] to perform hereunder and no act or failure to act shall be deemed a material breach hereof unless Owner or Company shall *first* deliver to Company or Owner a written notice specifying the alleged failure to act constituting such claimed material breach and Company or

> Owner shall have failed to cure the material breach within thirty (30) days after receipt by Company or Owner of such written notice." (Emphasis added.)

Plaintiff has never really disputed that before it can institute suit for any breach of the Crunch agreement it must give written notice of the alleged breach to the breaching party. If the breach is not cured within 30 days, only then may Famous be held liabile for said breach.

C. Applicable Law

It is settled law that:

> "A contract requiring notice or demand cannot be enforced unless the notice or demand provided for has been given." 10 N.Y. Jur., *Contracts*, §292, p. 247.

This principle was first enunciated in New York in *Seeley v. Osborne*, 161 A.D. 844, 147 N.Y.S. 116 (1st Dept. 1914), *rev'd on other grounds*, 200 N.Y. 416, 116 N.E. 97 (1915), wherein a contract read as follows:

> "In the event of failure to make payments as agreed upon, the total unpaid balance of the course shall be due upon five days' written notice to the address given above." *Seeley, supra*, Application for Re-Argument by Plaintiffs, p. 2.

The court held in a suit to collect the total unpaid balance that:

> "It is clear there was no cause of action against the defendant until a demand has been made upon him to comply with this contract." *Id.* at 854, 147 N.Y.S. 129.

Similar contractual notice provisions have been upheld as conditions precedent to suits for non-performance. In *Young v. Western Union Telegraph Co.*, 65 N.Y. 163 (1875) the Court of Appeals upheld the validity of a contractual provision which required presentation of a written claim for damages within sixty days of any breach in order to impose liability. And in *National Telefilm Associates, Inc. v. Pamandia Productions, Inc.*, 42 A.D.2d 514, 344 N.Y.S.2d 418 (1st Dept. 1973) (see Record on Appeal, p. 7), the court held that defendants' failure to comply with the notice provision of the contract similar to paragraph 15 above precluded them from exercising their contractual remedies on plaintiff's alleged defaults.

For adherence to the basic rule discussed above, see *Equitable Leasing Inc. v. Maguire*, 36 A.D.2d 1019, 321 N.Y.S.2d 409 (4th Dept. 1971) (no proper demand, no cause of action); *Elmohar Co. v. Phillips*, 188 A.D. 100, 176 N.Y.S. 440 (1st Dept. 1919) (no notice of intent to purchase certain materials, no cause of action for cost of same); also *Jessel v. Lockwood Textile Corporation*, 276 A.D. 378, 95 N.Y.S.2d 77 (1st Dept. 1950); *Jungman & Company, Inc. v. Atterbury Brothers, Inc.*, 249 N.Y. 119, 163 N.E. 123 (1928); *Baruch v. D. G. Dery Inc.*, 188 N.Y.S. 453 (App. Term 1st 1921); *Siegel Kahn Co. v. Knickerbocker Underwear Co.*, 81 N.Y.S.2d 541 (1st App. Term 1948); 17A C.J.S., *Contracts*, §478, p. 674.

D. The Notice Given

It is conceded that the only "notice" given by Contemporary was a telegram dated August 19, 1974 (A205-206) and a letter dated August 21, 1974 (A207). (See also A174; T2260 for stipulated fact F-36.)

The August 19th telegram to Famous, G+W and ABC reads as follows:

> "Be advised that the sale of Paramount Records to ABC Dunhill Corp. is in breech [sic] of our contract with Famous Music Corp. This action has affected the illegal seizure of our property from the national record market place. This action has caused irreparable harm. You are therefore advised that suit will be filed against ABC Dunhill Corp. immediately."

On August 21, 1974, plaintiff sent the following letter by registered mail to Famous, G+W and ABC:

> "In accordance with our Agreement of May 8, 1973 and specifically Paragraph 15[16] of said Agreement: you are hereby notified that you have materially breached Paragraph 12, among others, of said Agreement in that you attempted to make a contract or other agreement with ABC Dunhill Record Corporation [ABC Records] creating an obligation or responsibility in behalf of or in the name of the Contemporary Mission."

The only breach referred to in either document is the claimed improper assignment of the Crunch agreement to ABC. Most importantly, notice of non-assignability is not notice of non-performance. The two documents are devoid of the slightest hint of any charge of failure to perform. The only suit Contemporary could maintain as a result of the aforementioned telegram and letter is a suit for improper assignment. But it has been shown at page 20 herein that Crunch was assignable.

The failure to give the required contractual notice to Famous or ABC of the claimed non-performance by ABC prevents any suit against Famous for non-performance of the Crunch contract by ABC. The cases indicate that such notice

16. Even plaintiff recognizes that it was necessary to comply with paragraph 15 of the Crunch agreement in this letter.

must be given in accordance with the contractual requirements or no suit will lie, *Scordley v. Olsher,* 18 Misc.2d 424, 186 N.Y.S.2d 883 (1st App. Term 1959); *Gershman v. Barted Realty Corp.,* 22 Misc.2d 461, 198 N.Y.S.2d 664 (Kings Co. Sup. Ct. 1960).

The verdict as to ABC's breach is thus reversible as a matter of law since Contemporary is precluded from bringing any suit based upon a claimed breach of the Crunch contract of which it has not given the required contractual notice.

IV.

CONTEMPORARY IS ESTOPPED FROM CLAIMING ABC BREACHED THE CRUNCH CONTRACT.

The defendant lastly contends that Contemporary's repudiation of the assignment of the Crunch contract to ABC estopped plaintiff from suing for any breach allegedly committed by ABC. This means that the plaintiff may not impute any liability to Famous as a result of any breaches of the Crunch contract by ABC. This defense is premised upon the telegram and letter discussed above. Plaintiff has always contended that the assignment of the Crunch agreement was void *ab initio,* that all of the above defendants and ABC were so informed, and that ABC had no rights or obligations under the Crunch agreement. As to the Crunch agreement, plaintiff's counsel stated:

> ". . . [W]e are not saying that they [ABC] did have a contractual obligation." (A180; T2395).

The view that ABC did not have any rights or duties under the Crunch contract was first articulated in the August 21, 1974 letter, wherein Contemporary claimed that Famous could not assign the Crunch agreement (A207). Contemporary, having repudiated the assignment of the Crunch contract to ABC, is

thus estopped from claiming any breaches by ABC which impose liability on Famous for said breaches. Contemporary, having told ABC that the Crunch contract was not assignable, may not now assert a breach by ABC.[17]

The basic legal principle applicable in this case is as follows:

> "If one party repudiates the contract or refuses to perform, the other party is not obligated to perform his promise and non-performance in such event does not render such other party liable in damages." 10 N.Y.Jur., *Contracts*, §382.

This fundamental maxim has been followed in New York since it was first set forth in *Shaw v. Republic Life Insurance Co.*, 69 N.Y. 286 (1877). In that case, the Court of Appeals held that:

> "Where one party to a contract declares to the other party to it, that he will not make the performance on the future day fixed by it therefor, and does not, before the time arrives for an act to be done by the other party, withdraw his declaration, the other party is excused from performance on his part, or offer to perform . . ." *Id.* at 292, 293.

Some forty years later, the same court would rule that a claim of rescission would preclude any suit for non-performance in *Brennan v. Nat. Equitable Investment Co.*, 247 N.Y. 486, 489, 160 N.E. 924, 925 (1928). To the same effect see *Perlman v. Israel & Sons Co.*, 306 N.Y. 254, 117 N.E.2d 896 (1954); *Brenner v. Schreck*, 17 Misc.2d 945, 192 N.Y.S.2d 461 (2nd App. Term 1959); *Mignon v. Tuller Fabrics Corp.*, 1 A.D.2d 174, 148 N.Y.S.2d 605 (1st Dept. 1956); *Leonor v. Ingenio Porvenir C. Por. A.*, 34 N.Y.S.2d 705 (N.Y. Co. Sup. Ct. 1942). In *Tradewell*

17. Such an estoppel is particularly appropriate in light of plaintiff's insistence throughout the trial that it did not claim a breach by ABC. See page 20 *et seq.* herein.

Foods, Inc. v. N.Y. Credit Men's Adjst. Rent Bureau, 179 F.2d 567 (2d Cir. 1950) this Court recognized that one who causes non-performance should not be allowed to profit from that non-performance.

In the case at bar, how can the plaintiff claim that the attempted assignment by ABC was void *ab initio,* thus repudiating the assignment of the Crunch agreement to ABC and then almost two years later recover against Famous because ABC refused to perform the very contract repudiated by plaintiff? As a matter of simple equity, any non-performance by ABC would be legally excusable and thus no liability could be imputed to Famous. This plaintiff should not be permitted to repudiate the Crunch contract and then recover against Famous for non-performance by ABC. The verdict as to Crunch can be reversed on this basis alone.

V.

THE PLAINTIFF WAS NOT ENTITLED TO RECOVER ANY UNALLOCATED DAMAGES.

Contemporary and Famous both agree that if the appeal is successful as to either Crunch or Virgin, the plaintiff is not entitled to those unallocated damages, in the amount of $21,000, awarded via Liability Question No. 4. These were damages claimed as a result of breach of both Crunch and Virgin, but could not be attributed to either contract. If only one contract was breached, Contemporary has recoverd $21,000 of damages that cannot be attributed to a breach of either contract. Thus the jury had no proper basis to make such an award. This has been conceded by plaintiff in its memorandum filed at trial entitled "Specification of Damages Sustained by Plaintiff", p. 7. Likewise, the defendant concedes that if it does not prevail as to either the Crunch or Virgin verdict, then the verdict as to unallocated damages should be sustained.

CONCLUSION

For all of the reasons set forth above, the jury verdict and judgment entered pursuant thereto should be reversed and judgment entered granting plaintiff the sum of $16,500.

Respectfully submitted,

HAWKINS, DELAFIELD & WOOD
Attorneys for Defendant-Appellant

William B. Lawless
John F. Triggs
Of Counsel

APPENDIX

RULE 804

HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant-

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim or lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible[1] unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood,

1. So in original.

adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into existence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

CERTIFICATE OF SERVICE

76-7403 - 76-7440
Re: Contemporary Mission v. Famous Music

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Defendant-Appellant.

That on the 17th day of November, 1976, I served the within

Brief for Defendant-Appellant

in the matter of Contemporary Mission, Inc. v. Famous Music Corp.

upon William O'Reilly, Esq.
52 Sharon Drive
Windham, New Hampshire 02383

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 17th day
of November 1976.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977